No. 7012

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

LAKE UNION DRY DOCK & MACHINE WORKS,
Claimant and Appellant,

vs.

WILMINGTON BOAT WORKS, Inc., a corporation,
Libellant and Appellee,

THE BOAT "LUDDCO 41," her engines, tackle, apparel, furniture, etc.,
Respondent.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

HONORABLE GEORGE COSGRAVE, *Judge*

Brief of Appellant

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Brief of Appellant

STATEMENT OF THE CASE

This is an appeal from a final decree of the District Court of the United States in and for the Southern District of California, Central Division, sitting in Admiralty, which was entered on the 25th day of August, 1932, in a proceeding in rem instituted on the 27th day of April, 1931, by Wilmington Boat Works, a corporation, with a place of business at Wilmington, California, against the Motor Yacht "Luddco 41," her engines, tackle, apparel, and furniture.

The Lake Union Dry Dock & Machine Works, a corporation, with a principal place of business at Seattle, Washington, appeared as claimant July 16, 1931, the vessel was released from attachment by the posting of a $1500.00 stipulation for value (Ap. p. 16), the case proceeding on for determination upon the original libel (Ap. p. 2), and the answer thereto (Ap. p. 25) by said claimant.

No evidence was heard directly by the District Judge, Honorable George Cosgrave, but by stipulation of the parties the matter was referred to a United States Commissioner, Honorable David B. Head, for the taking of evidence, advisory findings and conclusions, and recommendations as to decree under a general order of reference, which was entered on the 23rd day of March, 1932 (Ap. p. 35).

The evidence of certain witnesses was taken by deposition, being the evidence of witnesses H. B. Jones (Ap. p. 60), Otis Cutting (Ap. p. 71), J. L. McLean (Ap. p. 74), and Harry C. Wilson (Ap. p. 78), all being witnesses on behalf of claimant and appellant. The testimony of witnesses Harry C. Carlson, Hugh M. Angelman and one other whose evidence is not included in the Apostles, was taken orally before the Commissioner.

After the conclusion of the evidence, and on the 23rd day of May, 1932, the Commissioner submitted a report containing a brief statement of proceedings, findings of fact, conclusions of law and recommendation that a decree be entered finding that the libelant had a good and valid lien against the respondent vessel in the full amount claimed, with interest and costs, and providing for usual condemnation and sale (Ap. p. 35).

To this report, findings, conclusion and recommendation of the Commissioner, claimant and appellant filed specific exceptions, as well as exceptions to the Commissioner's failure and refusal to make certain specific findings, conclusions and recommendations in favor of claimant and appellant, which raised the questions presented by this appeal (Ap. p. 38).

The matter of claimant and appellant's exceptions to said report, findings, conclusion and recommendation of said Commissioner, were not argued orally to the court, but were submitted on briefs.

On the 25th day of August, 1932, the District Court overruled all of claimant and appellant's exceptions to said commissioner's report, findings and conclusions, and also claimant and appellant's exceptions to said commissioner's failure and refusal to make speci-

fic findings and conclusions in favor of claimant and appellant (Ap. p. 43).

On said 25th day of August, 1932, over the exception of claimant and appellant, the District Court entered a final decree based upon the findings, conclusion and recommendation of said Commissioner, awarding recovery to libelant against the respondent vessel in the sum of $801.50, together with costs in the sum of $264.00 (Ap. p. 45).

On the 28th day of October, 1932, notice of appeal was served and filed (Ap. p. 105), together with assignment of errors (Ap. p. 106), and stipulation as to supersedeas, and original exhibits (Ap. p. 111 and 112).

STATEMENT OF FACTS

Except as to the controversy as to the nature and amount of the work done upon the vessel by the libelant, concerning which no issue is made in this court, there is very little dispute or contradiction in the evidence.

The admitted or uncontroverted pertinent facts are the following: The vessel in question was a pleasure yacht, completely constructed and finished, ready for operation, which had been built by the claimant

and appellant at its place of business in Seattle, Washington, and shipped by boat to the Yacht and Motor Sales Corporation at Wilmington, California, as new merchandise, on consignment, for the sole purpose of sale. Mr. Otis Cutting, Vice-President and general manager of claimant and appellant, testified (Ap. p. 73), that the respondent vessel when it was shipped to the Yacht and Motor Sales Corporation on consignment for sale, was complete and ready for operation, being complete in every detail, ready to start right out and run, having been tested out at Seattle before shipment.

Title to the vessel at all times remained in the claimant and appellant as consignor, and it was the understanding of consignor and consignee that title was never to pass to the consignee, but was to be conveyed direct from consignor to ultimate purchaser, when a sale was effected, consignee to receive a commission for the sale (Ap. p. 74). The witness Harry C. Wilson, by deposition testified that he was Secretary and Treasurer of consignee, the Yacht and Motor Sales Corporation, having a place of business at Wilmington, California, and that he was conducting the business of said consignee; that said Yacht and Motor Sales Corporation was a company doing the business of a yacht broker, and acting as a sales agent for cer-

tain stock lines of boats and motors (Ap. p. 78); that the respondent vessel was delivered into the possession of the consignee, Yacht and Motor Sales Corporation, at Wilmington, for the purpose of sale, consigned to said Yacht and Motor Sales Corporation as a new boat for sale, and that the Yacht and Motor Sales Corporation handled several lines of boats for sale as broker.

While the respondent vessel was in the possession of said Yacht and Motor Sales Corporation for sale as a broker, under consignment, the Yacht and Motor Sales Corporation decided to have some alterations made in the vessel, and for that purpose sent the same to libelant, where certain work, consisting of labor and material, was supplied by the libelant, forming the basis of libelant's claim of lien against the respondent vessel.

Mr. Harry C. Carlson, representative of the libelant, testified on behalf of the libelant as follows:

"Q. Now, you did work for the Yacht & Motor Sales Company on quite a number of boats, did you not?

A. Yes, we did all of it.

Q. These were principally new boats?

A. Yes, they were boats that had come down, shipped down to them.

Q. And they were different makes of boats, such as Kriskraft and such?

A. Oh, yes, whatever they had to do, they were sent up to us.

Q. You were performing labor on various makes of boats, new boats that the Yacht & Motor Sales Company sent over to you from time to time?

A. Yes." (Ap. p. 52.)

This witness further testified that when they were performing the work in question on the respondent vessel, the libelant knew that said vessel was then under negotiations for sale by the Yacht and Motor Sales Corporation to a prospective buyer, his testimony being as follows:

"A. * * * When we got those struts off, the prospect they had for buying this boat objected to the steel shafts that were in this boat, and it was decided to take those steel shafts out, which had nothing to do with the strut job.

Q. Who requested you to do that?

A. The Yacht & Motor Sales Company.

Q. All right.

Q. There were two shafts—no, one shaft. This prospective buyer wanted bronze shafts, and there was nothing said about the price, or anything else." (Ap. p. 49.)

Certain interrogatories were attached to claimant's answer, which interrogatories were answered by the

libelant. By such answers, the libelant admitted that the work in question was ordered by the Yacht and Motor Sales Corporation, that libelant was never informed by the Yacht and Motor Sales Corporation that it was the owner, the answer being further:

> "But as they were selling boats of this character and we were in the habit of performing work on any and all boats they sent to us, we had no reason to question their ownership and their authority to have the work done. * * * The bills were rendered as customary to the Yacht and Motor Sales Corporation, and payment was demanded from time to time * * *. The work was performed at the request of the Yacht and Motor Sales Corporation *on their statement that they had a customer for the boat, and they wished this work to be done so that they might make a sale.*" (Italics ours.)

The libelant by answer to interrogatory further stated that it did not know whether the boat was registered at the time, and that it had never questioned such matters when boats were sent to it by the Yacht and Motor Sales Corporation.

In answer to the specific interrogatory as to what, if any, the libelant did to ascertain who was the owner or the master, or the agent of the boat, libelant answered: "We do not know, as we have never questioned such matters when boats were sent to us by the

Yacht and Motor Sales Corporation." (See Ap. p. 29-32 for interrogatories and pages 32-34 for answers.)

The services of the libelant were performed between the 10th and 27th of September, 1930, and on the first day of November, 1930, an involuntary petition in bankruptcy was filed against the Yacht and Motor Sales Corporation. Mr. Harry C. Wilson testified that he did not see the bill for the work until after the Yacht and Motor Sales Corporation had ceased to be an operating company, and that he promised to pay for the work. (Ap. p. 100.) This witness further testified that before the libel was filed against the respondent vessel, he had a discussion with a Mr. Smith of the libelant company, the witness testifying with reference to such discussion: "There were two accounts I had with him, one was a general account for miscellaneous items, and one was a specific account on this specific boat. And I told him I would pay the one account in full on the boat if he would consent to be a general creditor on the other. That was my agreement." (Ap. p. 103.)

Mr. H. B. Jones, the secretary of the claimant and appellant and its attorney (Ap. p. 65), Mr. Otis Cutting, vice-president, treasurer and general manager (Ap. p. 72, 73); Mr. J. L. McLean, president (Ap. p.

75), all testified that the Yacht and Motor Sales Corporation was never given any authority to incur any liens against respondent vessel, and that said Yacht and Motor Sales Corporation had no authority to have any work done by outside persons upon the vessel, and that they had never been notified that any work had been done until after its completion, and this case had arisen.

Mr. Harry Wilson of the Yacht and Motor Sales Corporation confirmed the fact that his company never had any authority to incur any charges for the account of the claimant. (Ap. p. 88.)

SUMMARY OF FACTS

The respondent vessel was at all times owned by the claimant. The vessel was in the possession of the Yacht and Motor Sales Corporation as a yacht broker on consignment for the purpose of sale to an ultimate user. The libelant admittedly knew that said Yacht and Motor Sales Corporation, a corporation, was a broker selling new boats, built and shipped to it by other persons, and that it was not operating the boats except for demonstration purposes.

These boats, including respondent vessel, were pleasure yachts, being new vessels, and were not possessed by the Yacht and Motor Sales Corporation,

which ordered the work done in this particular instance for any utility purpose, but were possessed by it as *new merchandise for sale.* Libelant admittedly knew at the time of performing the work that the Yacht and Motor Sales Corporation, the broker possessing the vessel, was intending to immediately sell the same as a part of its business to a customer, the wishes of the customer as to change of shaft being admittedly conveyed to the libelant.

The libelant admittedly was in the habit of performing work for the broker on boats which it was in turn selling, and conveying on to purchasers, and never even inquired as to the broker's authority to incur any liens upon such vessels, nor did it inquire at all as to the basis on which the broker possessed the vessels, or its authority in connection therewith, and there is evidence to warrant the assumption that a simple inquiry would not have disclosed its lack of authority.

The broker did not own the vessel in question, it was not the managing owner, ship's husband, master or a person to whom the management of the vessel at the port in question was entrusted for operation, but was a broker possessing the vessel for a limited and special purpose of sale, which special purpose was

known to libelant, and the limitations of whose authority was sufficiently obvious and apparent as to have put libelant upon inquiry before attempting to acquire any lienable rights against the vessel.

From all of the evidence the libelant was not relying upon the credit of the vessel for it knew the vessel was intended immediately to be sold to an innocent purchaser, but, rather, was relying upon the express promise of the broker to pay. This is made convincingly clear by the undisputed testimony of Mr. Wilson, of the brokerage company, that after the insolvency of that company he expressly agreed with the libelant that he would pay the account in full on the respondent vessel if the libelant would consent to be a general creditor on its other account. (Ap. p. 103.)

SPECIFICATION OF ERRORS

The libelant has asserted eight assignments of error, which, for the sake of avoiding unnecessary repetition, are adopted as specifications of error to be discussed herein. (See Ap. p. 106-111.) Since all of the evidence was taken before the Commissioner and the decree of the court below was based upon the findings and conclusions of the commissioner, for the sake of further avoiding circuity of language, the argument hereafter will be discussed as though the error of the

commissioner in making his findings and conclusions, and in refusing to make findings and conclusions as requested by appellant, and the error of the court in overruling claimant's and appellant's exceptions to such findings and conclusions and exceptions to such failure to find and conclude in favor of appellant, and the error of the court in entering decree based upon said findings and conclusions of the commissioner, were single errors of the court in the first instance.

The assignments of error may be summarized as follows:

First: The court erred in finding and concluding that the Yacht and Motor Sales Corporation came within the classification of persons presumed to have authority from the owner sufficient to support the creation of liens. Section 972, Title 46, U.S.C.A.

Second: The court erred in finding and concluding that there was nothing which should have put the libelant on inquiry and that libelant acted with reasonable diligence, although making no inquiry whatsoever, even if said corporation came within said classification.

Third: The court erred in finding and concluding that there was no evidence of a specific agreement be-

tween the claimant and the Yacht and Motor Sales Corporation that the latter could create no liens.

Fourth: The court erred in finding and concluding that the libelant acquired a good and valid lien against the respondent vessel.

Fifth: The court erred in entering a decree against the respondent vessel in conformity with said above mentioned erroneous findings and conclusions.

Sixth: The court erred in failing and refusing to find and conclude as set forth in sub-paragraphs I, II and III of the 6th assignment of errors. (Ap. p. 109-110.)

Seventh: The court erred in failing and refusing to dismiss libelant's libel and to enter a decree in favor of claimant for costs.

ARGUMENT

Since the enactment of the Act of June 23rd, 1910, Chapter 373, 36 Stat. 604, and the Merchant Marine Act of June 5th, 1920, Chapter 250, 41 Stat. 1005, the acquisition of liens upon vessels has been regulated and controlled by such statutory enactments and at the time of the service performed by libelant in the instant case, the latter act was controlling. The pertinent provisions of that act are contained in Sections

971, 972, and 973 of Title 46, U.S.C.A., which, for the convenience of the court, are herewith set forth:

"971. Persons entitled to lien. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

"972. Persons authorized to procure repairs, supplies, and necessaries. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel .

"973. Notice to person furnishing repairs, supplies, and necessaries. The officers and agents of a vessel specified in subsection Q, section 972, shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice,* or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Under all of these sections *the authority,* either actual, or presumed by law, is made absolutely controlling, of whether a lien is or is not created.

In Section 971 the lien for certain specified services and material is made dependent upon either the *order of the owner* of the vessel, or a person *authorized by the owner.* This section relates to *actual authority.*

Paragraph 972 sets forth a class of persons who, by law, are presumed *prima facie* to have such authority from the owner.

Section 973 further defines persons by law presumed *prima facie* to have such authority, and then expressly provides that such *presumption* of authority may be *rebutted by fact,* and further provides that no one with knowledge or reasonable means of knowledge that the services or supplies are ordered by one *without authority* to pledge the credit of the vessel, may avail himself of either the remedy or the presumption of law.

FIRST SPECIFICATION OF ERROR

The evidence is clear and undisputed that the Yacht and Motor Sales Corporation had no authority to pledge the credit of respondent vessel, and the evi-

dence further discloses that the respondent vessel was in its possession for a limited and restricted purpose, which precluded any probable occasion for the pledging of such credit.

The Yacht and Motor Sales Corporation was a broker holding the ship on consignment for sale as a new and unused piece of personal property. It was not "managing" or "operating" the vessel within any common or reasonable interpretation of such words, as they are used in connection with ships and vessels generally. The respondent vessel and the other boats in its possession were new and unused pleasure craft, neither built nor intended for commercial purposes, and libelant was obviously not operating them as pleasure craft, or otherwise, than to demonstrate to prospective purchasers. The libelant in this case fully knew and understood these controlling circumstances.

The Yacht and Motor Sales Corporation did not come either expressly, or by reasonable implication, within any of the classifications of persons who are given authority either express or implied.

We find no decisions anywhere in the books where a lien has been claimed under the procurement of a party such as the Yacht and Motor Sales Corporation

in this case. If the mere statement of the uncontroverted facts of this case, and the language of the statute itself, is not sufficient to dispose of the question, we must resort to analogy. The nearest that we can find is the case of a contractor who is in possession of a ship, and who orders supplies and labor therefor from a sub-contractor, resulting in the sub-contractor endeavoring to impress a lien upon the vessel, based upon the order of the contractor. The case of *"The Juanita"* reported in 277 Fed. 438, involves such a situation.

In that case the contractor had undertaken with the owner to make certain repairs to the vessel. This contract called for a small amount of welding to be done and contained a provision that, if additional welding was found to be needed, and ordered, it be paid for, in some circumstances, at so much an hour, and, under other circumstances, at so much a square foot. The contractor had no welding plant of its own, and that fact was known to some of the officials of the owner. The contractor invited proposals for welding from two concerns and awarded the contract to the libelant in that case. After the completion of the work the contractor, upon an involuntary petition in bankruptcy, was adjudicated a bankrupt. The sub-contractor thereupon gave notice to the owner that it

would claim a lien in rem for the amount of its bill against the vessel, and filed its libel to support such a claim. These facts closely parallel those of the case at bar. Under the circumstances of that case, the court held:

> "At the hearing some attempt was made to show that, in ordering the welding from the sub-contractor, the contractor was acting, not for itself, but as agent for the owner, and that, as the owner had its inspector of welding on the job to see that it was done in a workmanlike manner, and that no excess time was charged for, there was a direct contract between the owner and the sub-contractor, as was held in *The James H. Prentice* (D. C.) 36 Fed. 777. The facts stated do not justify the conclusion sought to be drawn from them, and in short, after seeing and hearing the witnesses, I have no question that the owner made its bargain with the contractor and looked to it, and to no one else, to do the work. The sub-contractor *extended credit to the contractor, and never thought of seeking to hold any one else liable until bankruptcy intervened.* The finding that the sub-contractor gave credit to the contractor, and looked to it, and not to the ship, doubtless renders it unnecessary to inquire whether under other circumstances a sub-contractor can acquire a lien upon a ship. The Supreme Court, in *The Roanoke,* 189 U. S. at page 195, 23 Sup. Ct. 491, 47 L. Ed. 770, while noting that it never had occasion to decide the question, recognized that the general concensus of opinion in the state courts and in the inferior federal courts was that labor and materials furnished to a contractor do not constitute a lien upon the vessel, unless at least notice be given to the owner

of such claim before the contractor has received the sum stipulated by his contract. * * * *

"The cases in which a so-called sub-contractor has been held entitled to a lien, or to a right in the nature of a lien, against the ship appear all to have been cases in which, upon the facts, it was possible reasonably to hold that he was not a sub-contractor at all, but had an agreement with the owner, made through the contractor as the owner's agent, and as has been pointed out, that was not the case here, or else where state laws gave such a right to a sub-contractor. Since the passage of the fifth section of the act of 1910 (36 Stat. 605; Comp. St. Sec. 7787), re-enacted by the Merchant Marine Act of 1920 (41 Stat. 1006, Sec. 30, subsec. "X"), all the provisions of the State statutes are superseded in so far as they purport to create rights of action enforceable in rem against vessels for repairs, supplies, and other necessaries. Moreover, if the right contended for ever existed at all, it was, as Justice Brown in *The Roanoke* pointed out, upon the theory that the contractor was to be presumed to be the agent of the vessel in the purchase of such labor and materials, and since the act of 1910 that presumption can hardly be held admissible, for Congress was at pains in section 2 of the act (Section 7784) to enumerate the persons who shall be presumed to have authority from the owner to procure repairs, supplies and other necessaries, and, among persons so enumerated, contractors for ship repairs are not mentioned.

"It follows that the libel must be dismissed." (Italics ours.)

The principle of this case was approved in the very recent case of *The Pelotas,* 43 Fed. (2d) 571, at page 582.

Under the evidence of this case, the Commissioner and the Court found and concluded that there was no question but that the Yacht and Motor Sales Corporation came within the classification of persons mentioned in Section 972 of the law, and that the furnishing of repairs on this order, raised the presumption of a lien, and in so doing we believe the court clearly erred. The Yacht and Motor Sales Corporation held this ship as a broker under consignment for sale, its obvious interest in the vessel being only the procurement of a commission or profit on the transfer of ownership of the vessel to a purchaser. It was not a managing owner, nor a ship's husband, nor its master, nor any person to whom the "management" of the vessel at the port in question was entrusted. The vessel was not there for "management," nor for operation, nor for use; it was there for sale and disposal in the same manner and to the same extent that a new automobile is in the possession of an automobile dealer for sale, or a farm tractor in the hands of an implement dealer, or any other item of new merchandise in similar hands. It was not there for use or employment by the dealer, in any reasonable interpretation of the language, and we respectfully submit that where the Statute says: "Or any person to whom the management of the vessel at the port of supply is entrusted," that

language construed in the light of historical development, custom, the objects sought to be attained by the law and by construction consonant with the doctrine of *pari materia,* can only be construed to mean management of a vessel *as an instrument of commerce, in the use* and *employment for which it was intended,* and not as a new chattel for sale to a first owner other than the builder.

SECOND SPECIFICATION OF ERROR

Upon the foregoing evidence, the commissioner and trial court found and concluded: "From the circumstances of the transaction it is concluded that there is nothing which should have put the libelant on inquiry. The libelant was acting with reasonable diligence, although no inquiry was made. *Morse Dry Dock & Repair Co. vs. U. S.,* 298 Fed. 153."

This again, we submit, was clearly error.

The libelant well knew that this, and the other vessels in the possession of the Yacht and Motor Sales Corporation, were in the possession of the latter solely for the purpose of sale to purchasers. The libelant admits in its answer to the 12th interrogatory, that the work was performed at the request of the Yacht and Motor Sales Corporation *on their statement that they had a customer for the boat and that they wished this*

work to be done so that they might make a sale. (Ap. p. 34.) Mr. Carlson, witness for the libelant, also testified: "When we got those struts off, the *prospect they had for buying this boat objected* to the steel shafts that were in this boat, and it was decided to take those steel shafts out, which had nothing to do with the strut job." (Ap. p. 49.)

Under these facts, the libelant now contends and seriously asks the court to believe not merely that it thought that the Yacht and Motor Sales Corporation had authority to create liens, but further that it was actually relying upon the credit of the vessel, and believed that it secured and is now entitled to enforce such a lien.

The immediate transfer of this vessel to an innocent purchaser for value, was in the contemplation of all parties. The contention of the libelant must literally mean that it intended, if necessary, to pursue this vessel through such a sale, and attempt to enforce satisfaction of its claim, if unpaid, by means of a lien foreclosure in the hands of such innocent purchaser, notwithstanding that the purchaser was obviously buying new merchandise, and obviously would only so buy if he was given to understand that he was buying merchandise free and clear of encumbrances. The mere

statement of such a proposition seems to us perfectly absurd.

As has already been pointed out, the testimony of the witnesses, H. B. Jones, Otis Cutting and J. L. McLean, confirmed by the testimony of the witness Harry Wilson, was without contradiction to the effect that the Yacht and Motor Sales Corporation had no authority whatsoever to incur any liens on the vessel, and that it was not within the contemplation of the parties that any work would be required to be done to the vessel while it was in the possession of the Sales Corporation, other than the payment of taxes and incidental retouching of the finish for sale purposes.

The testimony was literally as follows:

(Deposition of H. B. Jones, Ap. p. 64.)

"Q. What was the understanding with reference to the upkeep of the boats after they had been shipped to the Yacht and Motor Sales Corporation?

A. The agreement was very definitely made that those expenses were to be borne entirely by the Yacht and Motor Sales Corporation.

Q. Was it contemplated that anything of any substantial character would be required to be done to the vessels after their shipment to California?

A. No; it was not expected that there would be any substantial work on them. The expenses

that we had in mind were insurance, taxes, warehousing expenses, if any, interest on the amount due the Lake Union Dry Dock & Machine Works, which they were to pay, and the necessary expenses of upkeep, which it was contemplated would be painting and cleaning and keeping up the boat in ordinary shape.

Q. Those boats, including this "Luddco 41," were new vessels, ready to operate, as they were sent down, were they?

A. Yes, they were newly constructed vessels.

Q. Was a definite understanding had about these maintenance charges; were they definitely discussed?

A. Either Mr. Wilson or Mr. Proctor—I think it was Mr. Wilson—stated definitely that they would keep up the boats in good shape by way of painting and varnishing them and maintaining them in good shape, at their own expense.

Q. Do you know whether or not they had a plant or equipment down there which would enable them to do that right at their own place?

A. They did have, and told us that they had their own men employed who would do that work.

Q. And you contemplated that that would be done?

A. That was our understanding, that that would be done by them at their own expense.

Q. Was any authority ever given to the Yacht and Motor Sales Corporation by the Lake Union Dry Dock & Machine Works, so far as your knowledge goes, by which they were authorized to have any outside work done on these ves-

sels by outside parties, or to incur any liens or lienable charges against them?

A. There never was any such authority given, and there never was any occasion for giving it, because there was never notice or intimation to the Lake Union Dry Dock & Machine Works, or to me, that there was any necessity for doing any such work, outside of the work that they would do to keep the boats painted and in condition, through their own employees and at their own plant."

(Deposition of Otis Cutting, Ap. p. 72):

"Q. Did you at any time, Mr. Cutting, give any authority to the Yacht and Motor Sales Corporation to incur any liens or lienable charges against this boat, while it was in their possession?

A. I did not.

Q. Was it understood that they were to have any such authority, at any time?

A. No sir.

* * * * *

Q. Mr. Cutting, were these boats, including this "Luddco 41," which were sent down there, under consignment, vessels complete and ready for operation?

A. They were complete.

Q. Was it contemplated that any construction work or alteration work, or repairs, or anything of that kind, would be required for them in any particular when they were sent down there?

A. No, sir; no work of that kind was anticipated.

Q. Were they or were they not ready to operate as boats, to start right out and run?

A. They were. They were tried out here before they were shipped.

Q. Were they completely finished as to furnishing and painting and everything of that kind?

A. Complete in every detail."

(Deposition of J .L. McLean, Ap. p. 75):

"Q. Did you at any time give any authorization to anybody connected with the Yacht and Motor Sales Corporation, or to anyone else, to incur any liens, or impress any lienable charges against this vessel, or any of the other vessels there?

A. Positively none whatsoever.

Q. Was it your understanding that any such charges were to be incurred by the Yacht and Motor Sales Corporation, in connection with these vessels while in their possession?

A. It was my very clear understanding that all ex-expenses incident to their care or upkeep, of any kind or nature, while the boats were in their possession and yet unsold, were to be borne by the Yacht and Motor Sales Corporation."

(Deposition of Harry C. Wilson, Ap. p. 88):

"Q. Did you have any authorization to order any work for the Lake Union Dry Dock, for its account?

A. No.

Q. Was this work ultimately billed to you, to the Yacht and Motor Sales Company?

A. Yes.

Q. And when you ordered this work you expected that the Yacht and Motor Sales Company was going to pay for the work?

A. Yes.

* * * ' *

Q. And you intended to pay for the work which you have mentioned here, as ordered done on this boat?

A. I promised to pay it.

Q. Promised to pay for that work?

A. Yes." (Ap. p. 100.)

It is clear from the several sections of the statute above quoted that if work and materials are not ordered by the owner of the vessel itself, or by a person expressly authorized by such owner, as provided in section 971, then only a rebuttable presumption of authority arises supporting a lien at the procurement of the specified persons mentioned in section 972; and section 973 eliminates even the presumption, as well as the actual creation of the lien: "When the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries, was without authority to bind the

vessel therefor." Predicated upon the erroneous premise that the Yacht and Motor Sales Corporation came within the classification of persons presumed to have authority under section 972 from the owner to create a lien, the court, as observed, found and held: "From the circumstances of the transaction it is concluded that there was nothing which should have put the libelant on inquiry. The libelant was acting with reasonable diligence, although no inquiry was made."

Quite the opposite of this holding, the Supreme Court of the United States, in construing the effect of the provisions of section 973 above quoted, in the case of *U. S. vs. Carver,* 1922 U. S. Sup. Ct., 67 L. Ed. 361, held:

> "We regard these words as too plain for argument. They do not allow the materialman to rest upon presumption until he is put upon inquiry—they call upon him to inquire. To ascertain is to find out by investigation. If, by investigation with reasonable diligence, the materialman could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if, in the same way, he could have found out its terms, he was chargeable with notice of its terms. In this case it seems that there would have been no difficulty in finding out both."

To the same effect are:

The Bon Lawers, 1930, D. C. W. D. Wash., 42 Fed. (2d) 897;

The Roseway, 1929 C. C. A., 2nd Cir. 34 Fed. (2d) 130;

The Dictator, 1927 D. C. La. 18 Fed. (2d) 134;

North Coast Stevedoring Co. vs. U. S., 1927 C. C. A., 9th Cir., 17 Fed. (2d) 875;

The Capitaine Faure, 1924, D. C. N. Y., 7 Fed. (2d) 131; affirmed C. C. A., 7 Fed (2d) 133; certiorari denied 45 Sup. Ct. 513, 268 U. S. 695, 69 L. Ed. 1161;

The Liberator, 1925, C. C. A., 4th Cir. 5 Fed. (2d) 585;

Morse Dry Dock & Repair Co. vs. U. S., 1924, D. C. S. D. N. Y., 298 Fed. 153;

The Coaster, 1921, D. C., W. D. Wash., 273 Fed. 609.

In speaking of the Yacht and Motor Sales Corporation, the libelant in answer to the 10th interrogatory, admitted: "We were never informed by them that they were the owners, but as they were selling boats of this character and we were in the habit of performing work on any and all boats they sent to us, we had no reason to question their ownership and their authority to have the work done." The answer to the 11th interrogatory was: "The bills were rendered as customary, to the Yacht and Motor Sales Corporation, and payment was demanded from time to time."

The 18th interrogatory was: "What, if anything, did you do to ascertain who was the owner, or who

was the master, or who was the agent, of the said boat, and when was this done?" The answer to this interrogatory was: "We do not know, as we have never questioned such matters when boats were sent to us by the Yacht and Motor Sales Corporation."

As was stated by Circuit Judge Wooley in the case of *The Yankee,* 233 Fed. 919:

> "Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. *The Patapsco,* 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred 'when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, a person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor.' This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. *The Kate,* 164 U. S. 458, 17 Sup. Ct. 135, 41 L. 512; *The Valencia,* 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or no one *awake to circumstances which suggest inquiry* as to that authority, *may shut his eyes to what he sees or to what*

he could see by looking, and avail himself of the remedies or the presumptions of the law." (Italics ours.)

There is nothing in the record in this case in any way to justify the assumption, or conclusion, that the libelant could not have ascertained the actual lack of any authority upon the part of the Yacht and Motor Sales Corporation to create liens upon this vessel, by merely asking a simple question of that company. A similar circumstance is commented upon, adversely to the libelant, in the case of *The Francis J. O'Hara, Jr.,* 229 Fed. 312. In this case the court said:

> "The real question is whether, upon the agreed facts, the intervening petitioner could, 'by the exercise of reasonable diligence,' have ascertained the master's lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others, she would not. It made no inquiry whatever, either from the master or the managing owner, though it might easily have done so, as to what lay she was operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth."

The nature of the business conducted by the Yacht and Motor Sales Corporation in this case, and the libelant's close familiarity with such business, as indicated by the answers to the interrogatories, we believe clearly proves that the libelant never looked to

any of the boats upon which it performed relatively trifling services, since these in ordinary course immediately passed into purchasers' hands, but in fact always relied entirely upon the credit of the broker. No other conclusion would be reasonable under the circumstances. The libelant states that they were in the habit of performing work on any and all boats the broker sent to them, and they had no reason to question its ownership and authority to have the work done. This can only mean that the broker had always paid its bills, and that they had never had occasion to rely upon the credit of any of the boats which it handled. The answer to the next interrogatory confirms this. "The bills were rendered as customary to the Yacht and Motor Sales Corporation, and payment was demanded from time to time."

As in the case of *The Juanita, supra,* it was undoubtedly the filing of the petition in bankruptcy against the sales corporation which first put the idea into libelant's head of attempting to press claim against the vessel, and we submit that it is as unjust and inequitable to permit the burden of the sales corporation's debts to be unloaded upon the claimant and its property, which was an innocent party and had no knowledge of what had been done, or reason to anticipate the same, as it would be to permit the libelant

to successfully press its claim of lien against the vessel in the hands of the ultimate purchaser, if the sale, which to libelant's knowledge was in contemplation, had been concluded.

The changing of the propellor shaft from steel to bronze, and the work and material incident thereto, was done at the request of the prospective purchaser, and was in no sense necessary work within the purview of Section 971. It was simply substitute original constructions, for which no lien has ever been permitted.

THIRD SECIFICATION OF ERROR

The commissioner and trial court found and concluded: "Going further, there is no evidence of a specific agreement between the claimant and the Yacht and Motor Sales Corporation that the latter could create no liens. The agreement between the parties as to which was to bear the expense of repairs, did not exclude the usual authority possessed by a person in possession of a vessel, to use the credit of a vessel for its benefit. The agreement between the owner and the person in possession under charter or contract, fixes their respective rights and obligations, but is not binding upon third parties."

Quite contrary to this finding and conclusion, as we have specifically pointed out in discussing the second specification of error, the evidence is conclusive that the claimant was owner and consignor, and the sales corporation was merely a consignee, which relationship in itself limits and restricts the rights and privileges of the sales corporation, and the evidence is overwhelming, and without contradiction, that it was expressly understood and agreed between the parties that the consignee should possess the property of the consignor for sale purposes only. This purpose precluded the creation of any lienable charges, except that of taxation created by law, and this the consignee agreed to bear. The evidence is further conclusively, and without contradiction, that the consignee was *given no authority* to do anything with the vessel to *create* a lien, and it was expressly agreed that it should not do so.

If presumption can be indulged in in this case, as the trial court seeks to do under Section 972, that presumption must yield to ultimate fact, and the absence of such right of presumption we believe is clearly manifest from the relationship of the parties, as well as by express agreement.

Actual lack of authority is as effective in preventing a lien from being created, as is an express written

prohibition in a case where a person in possession actually comes within the classification of Section 972. L The case of *The Henry W. Breyer,* 17 Fed. (2d) 423, involved a case where the procurer of supplies and repairs was acting under an oral agreement *containing no express provision forbidding,* the placing of liens upon the vessel for supplies, *or even that the procurer should pay for such* as he might order.

In that case the court held that, from the circumstances of the case, the procurer, who was a purchaser in possession, must, by implication, be held to have agreed to pay for the supplies, and hence no lien was created, and by the same reasoning, the last mentioned finding and conclusion of the trial court is unsustainable.

In this case of *The Henry W. Breyer,* the court held the procurer a purchaser in possession. The court goes on to say:

> "Since the supplies were furnished before the mortgage was executed, it is necessary only to determine whether a lien arose when they were received by the ship. The existence of the lien depends (1) upon whether the goods were ordered by the owner of the ship or a person authorized by the owner, as described; and (2) upon whether the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that the person ordering the supplies was without authority to bind the vessel. * * * *

"The more serious question is whether the purchaser, in view of the terms of the agreement with the Shewans, was authorized to charge the vessel for supplies. *The oral agreement contained no express provision forbidding the purchaser to place a lien on the vessel for supplies, or even that the purchaser should pay for such as he might order.* Nevertheless an agreement on the part of the purchaser to pay for the equipment is *necessarily implied from the circumstances of the case.* The cash payment was only $12,500 on account of a total purchase price of $115,000. The vendors, through the Shewan corporation, were to place adequate repairs upon the boat to make her seaworthy, which actually most $8,765.63. The whole transaction was contigent upon an American registry of the vessel, and, if this failed, the vendors were to pay for the repairs. There is no suggestion that in this event the vendors were also to pay for such equipment, services, and supplies as the purchaser might see fit to order. The letter of December 29, which was written after all of the supplies delivered by Baker, Carver, and Morrell had been received, refers only to the preferred mortgage and to the lien of the Shewan corporation for repairs. The bill of sale of December 30 also refers only to this bill for repairs. All these facts, and the care exercised by the sellers in requiring the purchaser to state in writing that the ship was held in trust for them during the interim between the bill of sale and the execution of the mortgage, *indicate that the parties understood that the purchaser was to pay all expenses incurred by the ship pending the transfer,* so that there would be no claim against her prior to the purchase-money mortgage and the claim of the Shewan corporation, which, in effect, belonged to the mortgagees.

"If this situation could have been ascertained by the furnishers by the exercise of reasonable diligence—that is to say, if it could have found out by inquiry on their part—then the lien did not arise. The Circuit Court of Appeals for the Fifth Circuit, in *The Yarmouth,* 262 F. 250, relying upon *The Kate,* 164 U. S. 458, 17 S. Ct. 135, 41 L. Ed. 512, and *The Valencia,* 165 U. S. 264, 17 S. Ct. 323, 41 L. Ed. 710, held that a provision in a charter party requiring the charter to provide and pay for coal was sufficient to prevent Section 3 of the Act of June 23, 1910 (36 Stat. 604, Comp. St. Sec. 7785), from having the effect of giving a lien on the ship for coal furnished on the order of the charterer, if the furnisher by the exercise of reasonable diligence could have ascertained the terms of the charter party. *The extent of the duty of the furnisher to make inquiry is much broader than was supposed at the time of the decisions in The Oceana and The Yarmouth, and it is now well settled that nothing short of actual inquiry will suffice. United States v. Carver,* 260 U. S. '82, 43 S. Ct. 181, 87 L. Ed. 361; *The Moosabee* (C. C. A.) 1 F. (2d) 964; *United States v. Neponset,* 13 F. (2d) 808, 1926, A. M. C." (Italics ours.)

Also in the case of *The Lucille,* 208 Fed. 424, at page 426, the court held:

"The First Circuit Court of Appeals, in considering this Statute, in the case last cited, said:

'Of course, this does not bar proof that whatever was furnished was furnished on the mere credit of the owner, and in no sense on the credit

of the vessel.' 200 Fed. 371, 118 C. C. A. 523.
* * * *

"In the *Lottawanna,* 21 Wall. 558, 22 L. Ed. 654, it was held that rule 12 adopted by the Supreme Court in 1872 that 'In all suits by materialmen, for supplies, or repairs, or other necessaries, * * * the libelant may proceed against the ship and freight in rem, or against the master and owner alone in personam,' was to render rule 12 of 1844 general in its terms, giving to materialmen in all cases their option to proceed either in rem or in personam.

"If the parties interested in this proceeding had the option to proceed either in rem or in personam, *they unquestionably had the option to give credit to the owner or to the vessel, and if they gave credit to the owner, they thereby waived their right to a lien on the vessel.* There is no law to prevent such waiver. Act June 23, 1910, Sec. 4; *The D. B. Steelman* (D. C.) 48 Fed. 580, 581.

"It is contended by the counsel opposing the exceptions that it clearly appears from the evidence in the case that the libelants gave credit to the owner for the supplies furnished and that they thereby waived their right to a lien on the vessel. From a careful examination, and consideration of the evidence, my conclusion is that the contention is well made.

"The ruling of the commissioner is, in my opinion, correct, and his report is accordingly in all things confirmed. It is so ordered." (Italics ours.)

In the case of *The Coaster,* 273 Fed. 609, the court said:

"The presumption of the statute may unquestionably be removed, and the right of lien based upon it destroyed by proof which overcomes it. *The Patapsco,* 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This proviso is merely a statutory declaration of a principle long recognized in maritime jurisprudence and announced by the Supreme Court in *The Kate,* 164 U. S. 458, 17 Sup. Ct. 13', 41 L. Ed. 512, and *The Valencia,* 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710. No one with knowledge that fuel or supplies are ordered by one without authority acquires a lien, and *one cognizant of circumstances which suggest inquiry may not close his eyes and avail himself of presumptions of the law.* Under these circumstances a lien may not be impressed. There is no question as to whom credit was given prior to 1919 for fuel and supplies furnished to the same launch, nor can it be reasonably asserted that the credit was not primarily extended to the Canning Company in 1919." (Italics ours.)

THE 4TH, 5TH, 6TH, 7TH and 8TH SPECIFICATIONS OF ERROR

We believe that the error committed by the court, as asserted in the specifications of error enumerated in this heading have been completely and sufficiently covered by the argument which has heretofore been made, and that it must follow that the District Court erred in finding and concluding that the libelant ever acquired a lien against the respondent vessel, and in decreeing recovery thereupon, and consequently that

the court also erred in not dismissing the libel and entering a decree for the claimant, and it is respectively submitted that this Court should so hold and decree.

Respectfully submitted,

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